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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

Protest of Bid Rejection as Nonresponsive

FILE: B-180834

DATE: July 18, 1974

MATTER OF: Struthers Electronics Corporation *P. 2699*
~~Invitation for Bids N00039-74-R-0027~~

- DIGEST: 1. Bidder under brand name or equal purchase description who offers an equal item listed in its bulletin as having a power rating of 1 kw peak while the IFB requires 3 kw peak, does not satisfy requirement of brand name or equal clause by mere statement in bid that item will easily withstand 3 kw despite bulletin listing of 1 kw.
2. Where bidder stated in bid that item offered as equal was previously supplied to a different facility of same agency under another contract, GAO believes that procuring activity should have attempted to verify whether prior contract items met requirements of instant IFB before determining that bid was nonresponsive for failure to furnish sufficient data with bid. However, bid was properly rejected nevertheless since subsequent inquiry reveals that available records of prior procurement do not indicate that requirements in that case were met by furnishing an unmodified commercial product.
3. Allegation that brand name item does not comply with solicitation requirements raised months after protester was informed of award to brand name manufacturer is untimely raised. See 4 CFR 20.2(a).

This matter concerns the rejection of Struthers Electronics Corporation's bid as nonresponsive to the above-referenced solicitation issued by the Naval Electronics System Command for the Narda Microwave directional coupler, Model 3202-B-10, or equal.

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Struthers offered its own model 119-166LX as an equal product. The solicitation contained the standard Brand Name or Equal clause prescribed by Armed Services Procurement Regulation 1-1206.3(b)

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which, in pertinent part, requires that bids offering equal products clearly identify the product offered and provides that the Government shall determine the equality of the product on the basis of the information furnished by the bidder or identified in the bid, as well as other information reasonably available to the purchasing activity. Bidders were required to furnish as a part of their bids all descriptive material necessary for the procurement office to (i) determine whether the product offered meets the requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposed to furnish and what the Government would be binding itself to purchase by making an award.

The cover letter attached to Struthers' bid noted that the bidder had previously furnished the identical item to another Navy facility and also stated that its "bulletin 9-166" was enclosed therewith to describe the item offered. The letter further stated that the peak power rating of 1 kw shown on the bulletin was a conservative rating and that Struthers' commercial model "will easily withstand 3 kw peak power" as required by the solicitation's salient characteristics.

It is reported by the Navy that the Struthers' bulletin 9-166 was not in fact enclosed with the bid. Nevertheless, based on the statement in the cover letter that the bidder's bulletin showed 1 kw for the model, the Navy concluded that the bid was nonresponsive since the model did not meet the IFB requirement of 3 kw peak power.

With regard to the peak power, Struthers states that the item furnished under the prior contract was qualified to withstand 10 kw of peak power, and therefore the statement that the offered item will withstand 3 kw peak is true. Finally, in its rebuttal to the Navy's report, Struthers questions whether the IFB brand name model fully complies with the salient characteristics of the solicitation.

Bulletin 9-166, a copy of which was forwarded to this Office by Struthers, describes a number of Struthers directional couplers, including model number N9-166LK. As stated by the bidder, the bulletin does list a power rating of 1 kw peak for the model while the IFB required a rating of 3 kw. It is clear that Struthers did not propose to modify its commercial model; however, the bidder did state in its bid that the model "will easily withstand 3 kw peak power" despite the bulletin description of only 1 kw. Moreover,

the bidder stated that "37 pieces of this item have been previously supplied to the government, Naval Avionics Facility, Indianapolis, under Contract N00163-72-C-0363."

We have held that a mere promise by the bidder to conform to the salient characteristics of the IFB does not satisfy the descriptive data requirement of the brand name or equal clause, 50 Comp. Gen. 193, 201 (1970). Rather the determination of precisely what the bidder is proposing and will be bound to furnish if awarded the contract must be made on the basis of the descriptive data submitted with, or referenced in, the bid. 41 Comp. Gen. 366, 368 (1961). Therefore, we believe that where the bidder's standard literature indicates that its commercial product does not conform to the IFB performance requirements, a mere statement by the bidder that the item will meet the IFB performance requirements is not sufficient to satisfy the requirements of the brand name or equal clause.

In concluding that the Struthers' bid was nonresponsive because of the peak power requirement, the procuring activity did not attempt to ascertain whether the items furnished by Struthers under its prior contract met the requirements of the instant IFB, as indicated by the bidder. In our opinion the procuring activity should have attempted to verify whether the prior contract items met the requirements of this IFB before rejecting Struthers' bid.

Subsequently, however, the Navy facility in Indianapolis with which Struthers had previously contracted, advised our Office that the solicitation did not provide for a brand name or equal procurement. In the prior case Struthers did not reference a specific model in its bid but, rather, simply committed itself to comply with the specification and drawing furnished by the Navy. Moreover, the available records at Indianapolis, which include the pre-award survey and the inspection report Form DD 250, do not indicate whether Struthers proposed to meet or met the requirements of that procurement by furnishing an unmodified commercial model.

Thus, it appears that Struthers did not provide the procuring agency with sufficient information to permit a determination that its product met the requirements of the IFB. Accordingly, we find that the bid properly was rejected as nonresponsive.

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Finally, we have noted that in its reply to the administrative report Struthers' for the first time raised the issue of whether the brand name item complies with the salient characteristics set forth in the solicitation. Section 20.2(a) of our Interim Bid Protest Procedures and Standards (4 CFR 20.2(a)) requires protests to be filed not later than 5 days after the basis for protest is known or should have been known. Since the allegation was made months after Struthers was informed of the award to Narda the issue is untimely raised and will not be considered.

For the reasons stated the protest is denied.


Deputy Comptroller General
of the United States